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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

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No. 216.

C. G. BALLENTYNE AND HONOLULU RAPID TRANSIT AND LAND COMPANY, APPELLANTS,

vs.

WILLIAM O. SMITH, TRUSTEE; THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, AND C. S. DESKY, APPELLEES.

BRIEF FOR APPELLEE WILLIAM O. SMITH, TRUSTEE.

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WILLIAM O. SMITH, TRUSTEE; THE PACIFIC HEIGHTS ELECTRIC RAILWAY COMPANY, LIMITED, AND C. S. DESKY, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR WILLIAM O. SMITH, TRUSTEE, APPELLEE.

Not yet having before us the brief for the appellants and wishing to indicate certain facts appearing on the record, we desire to present the following

Statement of the Case.

Upon a bill for the foreclosure of a deed of trust, pending before the Honorable W. J. Robinson, third judge of the

First Circuit Court of the Territory of Hawaii, sitting at Chambers, in equity, the court made a decree for the foreclosure of the deed and the sale of the mortgaged property, the greater part of which consisted of the property and effects of the Pacific Heights Electric Railway Company, Limited. The company had ceased business and closed its plant before proceedings began.

The decree directed the court's commissioner, therein appointed, to "sell all and singular the property * * * or so much thereof as shall be necessary to raise the whole amount due" (Transcript of Record, page 33), the commissioner then "to make due and full return of such sale to this court for its approval and confirmation" (Transcript of Record, page 34).

The sale was advertised by the commissioner, by newspaper publication, as one to be made "subject to the confirmation of the court" (see Exhibit "A," Transcript of Record, page 41), and likewise by posting of bills. (See Exhibit "B," Transcript of Record, page 42.) The decree and notices of sale were read at the sale. (See commissioner's return and account of sale, Transcript of Record, page 37.)

Pursuant thereto the commissioner held a sale on February 4, 1905, at which he offered the entire property as a whole, excepting only a certain steam condenser, sold separately, and a cable, reserved from the sale because affected by a pending writ of error brought by the Rapid Transit and Land Company. The highest bids offered were: for the condenser $100, and for the railway property, $1,100, this last having been made by C. G. Ballentyne, an appellant here (Transcript of Record, page 37).

The commissioner made return to the court with the representation that the respective sums so bid were disproportionate to the values of the properties, and the recommendation that the sales should not be confirmed (Transcript of Record, page 38).

The bids aggregated but $1,200, against which the com-

missioner's return and account of sales showed $1,338, expenses and charges, plus $247.80 for sums advanced by the petitioner for costs of suit and watchman's wages, or $1,585.80 for expenses alone, leaving a deficit here of $385.80, exclusive of the commissioner's fee. Besides this deficit on account of costs and expenses of suit and sale, there remained wholly unsatisfied the large judgment on the mortgage debt, in the sum of $56,025, making the total deficiency, exclusive of the commissioner's fee, of $56,410.80. (See Transcript of Record, pages 38 to 40.)

Motions were filed, on the one hand, by the bidder, C. G. Ballentyne, an appellant here, for a confirmation of the sale of the railway property (Transcript of Record, page 44), and, on the other hand, separately by the appellees, *contra*, the latter with a prayer for an order directing a resale of the property in parcels (Transcript of Record, pages 44 and 46). The motions for resale were based upon the ground of gross inadequacy of price, and that a confirmation would unfairly prejudice the parties for whose benefit the action was brought and those who were interested therein, and also that a resale in parcels instead of as a whole would be more beneficial.

On the hearing before the court a great amount of testimony was received, pro and con, to establish the real salable value of the property, and the court found that the evidence was overwhelming that the actual value of the property was at least seven times the amount of the highest bid (Transcript, page 48), and ordered a resale of the railway property in parcels. The steam condenser was sold separately and is not concerned on this appeal. In speaking of the "property" we refer always only to the railway property.

On an appeal this order was affirmed, and hence this final appeal.

Deeming that certain other points sought to be made by the appellants on the last appeal, and controverted by the appellees, have now been abandoned by the appellants, in

that they have provided no foundation therefor in the record now before this court, we touch upon none of them; but we desire to comment upon what might otherwise seem an inexplicable circumstance—*i. e.*, the appearance of the Honolulu Rapid Transit and Land Company as an appellant here.

It is claimed by that company that it obtained an assignment of the rights of C. G. Ballentyne under his bid—a "transfer of the property," as appellants have put it—after the date of sale and before the hearing on return of sale. Appellants have heretofore claimed that this was a sale of the property by the purchaser to a third person, to which we have rejoined that the transaction amounted to nothing more than a transfer of an unaccepted bid, which bid was made subject to acceptance and confirmation by the court, but which has never been either accepted or confirmed. The transit company was, moreover, a party to the foreclosure suit itself, on account of having been possessed of a certain cable acquired by it from the Pacific Heights Electric Railway Company, Limited, subject to the trust deed, and so had full notice of the terms of the decree and sale. We submit that this rebuts any claim that that company was a purchaser for value or without notice. The cable not having been covered by the rejected bid, the company is not a party to this appeal in that connection.

ARGUMENT.

The issue on this appeal is single and is one of law only. The only fact heretofore in issue was that of the value of the property and whether such value exceeded the amount of the bid. By grace of the court's finding that the value was grossly in excess of the bid the appellants are now able to claim that the amount involved in the case is sufficient to bestow jurisdiction for this appeal, and they no longer claim that the bid was not grossly inadequate. It is submitted

that their very appeal here precludes them from questioning that character of the bid. It is now contended, therefore, by the appellants that upon a judicial sale inadequacy of price, however gross, if not coupled with any facts or circumstances showing fraud, irregularity, mistake, or the like, is not a sufficient ground to warrant a refusal by the court to accept the best bid, whatever it may be, and confirm the sale.

Following this claim the appellants cite authorities which in the main, in the view of the appellees, relate not to judicial but to execution or law sales, or those made under a statute pursuant to its fixed terms, by an executive officer, as distinguished from sales made and conducted by a court through its appointed agents.

The appellees before the court rely upon two positions:

First. That the decision of the Supreme Court of the Territory of Hawaii in this case, though not so broad as contended for by the appellees, amply covers the case at bar and is supported by the authorities, which, we also submit, go further than the decision itself. And in this decision it is declared that "a judicial sale may be set aside before con- "firmation for such gross inadequacy of price as shocks the "conscience or raises a presumption of unfairness, but not "for mere inadequacy unless accompanied by other cir- "cumstances such as fraud, accident, mistake, etc.; and "whether such a sale should be set aside or confirmed is "largely a matter of sound judicial discretion, and a de- "cision by the trial court in a case of this nature should "not be reversed unless clearly erroneous." (See syllabus, Transcript of Record, page 52.)

Second. That our primary contention in this case still holds good; that the rule contended for by the appellants is applicable only to execution or law sales (except where statutes intervene), and that in judicial sales the court making them has full power in its discretion to reject an in-

sufficient bid and refuse to confirm a sale, and otherwise to conduct its sales as it deems for the best interests of the cause and the parties before it, and that a person bidding at such a sale, "subject to confirmation by the court," acquires no vested right to have his bid accepted merely because it is the best bid made, and acquires no rights under his bid until the same is accepted by the vendor, the court, and the sale confirmed.

Preliminarily, we state our contention, in every view of the case, as said by the circuit court in its decree: "This is "not an application to *set aside a sale* but merely a hearing "upon a return of sale for the purpose of determining "whether or not the sale should be confirmed" (Transcript of Record, page 49). This is more fully covered by our discussion of the second ground relied upon by appellees.

OF THE FIRST POSITION OF APPELLEES:

In our argument heretofore we have urged that, even conceding that the rule in question is applicable as well to judicial as to execution sales, it is not in the conjunctive, as claimed by the appellants, in the sense that the inadequacy must be so gross as to shock the conscience *and* either be presumptive evidence of fraud or be accompanied by circumstances showing accident, mistake, etc., but it is in the alternative, "or"—that is, that inadequacy, if so great as to shock the conscience or sense of fairness, is of itself sufficient to warrant the rejection of the bid and the making of a resale where the sale is judicial.

Our Supreme Court has distinguished between "*mere* inadequacy" and "inadequacy so gross as to shock the conscience or imply unfairness"—that is, that "mere" inadequacy means "slight" inadequacy and not inadequacy "alone," saying also that "if the inadequacy is *not gross*, it should be accompanied by other circumstances" (opinion, Transcript of Record, page 53; italics ours).

And our court has also held in this case that in the case of a judicial sale "it is the grossness of the inadequacy which implies the fraud or unfairness, and it is sufficient if the inadequacy is so great as to imply that, even though it does not suggest the nature of the fraud and there is nothing else to show in what it consisted. * * * It is sufficient if the grossness of the inadequacy is such as to afford substantial evidence that for some perhaps unknown reason the property has been greatly undersold" (Transcript of Record, page 57), adopting the words of the court in the case of Magann *vs.* Segal, 92 Fed., 252, quoted in Transcript of Record, page 56, where there follow also the words "so much so that the purchaser has not only merely a bargain, with a fair margin for profit, but an unconscionable advantage of the parties for whose benefit the sale has been made."

The court, after a review of the evidence of value, has accepted the finding of the circuit court "that the price bid was grossly inadequate and that an amount vastly in excess of that could be obtained on a resale," and that "the evidence was overwhelming that the actual value of the property was at least seven times the amount of the highest bid" (Transcript of Record, pages 48 and 58), and therefore has branded the bid in this case as one "grossly inadequate;" so much so that it considered it unnecessary to pass upon the other circumstances which were presented, in addition to the claim of inadequacy, tending to show that the defendant Desky, who, next to the bondholders, was most interested in the property, was excusably misled into supposing that the sale was to occur at a different time or place, and so was unable to be present, and likewise declined to pass upon the point made that property of the character and condition in question should have been offered in parcels instead of as a whole, and the fact that it had been offered as a whole had resulted in bidders having been kept away because they would not consider taking over the whole property, but would compete for selected portions (Transcript of Record, page 58).

To have been relied upon here we assume that the evidence of the circumstances, not even sufficiently referred to by the court in its passing attention thereto, should be upon the record before this court to permit a determination of their sufficiency, if necessary, though we believe that the existence of the claim thereof fully appears by the decision as above noted. In our confidence, however, that no such matters are needed to support a decision in favor of the appellees we have not presented them here, and, in fact, neither did the circuit court consider it necessary to pass upon them.

Authorities from other jurisdictions are clearly in support of the principle here decided and applied, many of them going beyond the extent required to uphold the ruling before us.

As to the use of the alternative "or" instead of "and," whereby it meant that gross inadequacy of price, shocking to the conscience, is sufficient of itself, see:

Graffam vs. Burgess, 117 U. S., 180, 191.
Rorer, Judicial Sales, sec. 28.
17 *Am. & Eng. Ency. of Law* (2d ed.), pages 1000-1002.
Magann vs. Segal, 92 Fed., 252, 259.
Pewabic Mining Co. vs. Mason, 145 U. S., 367.
Fidelity Ins. Co. & S. D. Co. vs. Roanoke St. Ry. Co., 98 Fed., 476.
Marlett vs. Warwick, 18 N. J. E., 111.

For cases as to a *sacrifice* being sufficient see:

Ganst vs. Moss, 20 Ill., 549.
Page vs. Kress, 80 Mich., 85.

We submit that there is fallacy in the argument, and in the few cases which support it, that while the courts must strictly adhere to the rule that in the absence of anything additional to inadequacy of price (however gross) the sale must stand, yet they must "seize upon" or "grasp" *any*

slight circumstances to assist or justify them in interfering. It is plainly conceded that inadequacy is the cause of their desire to do so. "Inadequacy is still the main ground for disturbing the sale, for if the price were of full value, or even a passable one, then the objectionable facts or circumstances could have worked no evil" (Transcript of Record, page 55). Why adhere to a mere legal fiction (if it exist at all) which prevents justice being done when it is perceived that it should be done and when the cause for interference exists and is recognized as such?

In the case of *Smith vs. S. S. City of Columbia*, 11 Haw., 709, our Supreme Court used the conjunctive "and" in stating their view of the rule, but in their opinion in the present case, in response to appellees' examination and views of that case, they say that though it is true that in that case they used the conjunctive, yet it was not with the intention that these two conditions of the rule respecting a resale should be considered "as being two different or disconnected things which must unite in order to warrant setting aside a sale" (Transcript of Record, page 57).

And the court has applied the rule, in this light, to the case at bar; it has held that "gross inadequacy" is sufficient, for that implies an unfairness or disadvantage that should be removed. The cases reviewed by the court certainly sustain the decision, and the present case comes well within the rule adopted.

We rely upon the sufficiency of the decision in this case to insure its affirmance on the present appeal.

OF THE SECOND POSITION OF THE APPELLEES:

The rule referred to is strictly applicable only to law or execution sales as distinguished from judicial sales proper.

We believe that many of the cases which, at first blush, seem to comprehend all sales and support appellants' claim will, upon an examination, show that almost without exception they apply to execution sales at law and not to

judicial sales, or that they are the result of a misapprehension and misapplication of the law rule, and a reference to their own citations will usually demonstrate this. Their very authority rests on cases decided with respect to execution sales. There are, however, some cases of the highest authority which apply the rule to strictly judicial sales, but always with the limitation provided by use of the alternative "or" instead of the conjunctive "and." These we have already referred to in the foregoing portion of this brief.

It is our view that the cases discussing the points of refusal to set aside a sale or to confirm a sale for inadequacy of price may very properly be classed under at least three distinct heads, namely:

Class I: Legal, or non-judicial, sales, concerning which the term "legal" or "law" sales should be used instead of "judicial" sales, this being a correct statement of the rule itself;

Class II: Sales under code practice and sales not purely judicial, where the rule may or may not apply, according to the status of the sale under statutes bearing upon their conduct or effect; and

Class III: Judicial sales, to which the rule should have no application.

Class I: In this are included execution sales, sales under power in mortgages and deeds of trust, etc., and all sales not made under direct judicial decree or requiring confirmation by the court ordering and holding them. The rule that inadequacy of price is not alone sufficient to justify the setting aside of a sale at law applies to this class.

The term "judicial sale" is used with much freedom by counsel for the appellants, and, it seems, sometimes indiscriminately by some of the courts, as applying to all sales resulting from legal proceedings in a court either of law or equity.

A "judicial sale" does not include a sale at law or any sale not in contemplation of law made directly by the court

and subject to its confirmation. On this point we quote from *Freeman on Void Judicial Sales,* section 1, inasmuch as it succinctly states and supports our argument:

"Precisely what sales can accurately be denominated 'judicial sales' is not very well settled. Of course they must be "the result of judicial proceedings, and the order, decree or "judgment on which they are based must direct the sale of "the property sold. There can be no judicial sale except "on a pre-existing order of sale. And probably the order "of sale, is not, alone, sufficient to entitle the sale to be "called judicial. In a State where an administrator's sale, "though made by virtue of an order of court, was not re"quired to be reported to the court nor to be confirmed, "Judge Story held it not to be a judicial sale. If, however, "a sale is ordered by the court, is conducted by an officer "appointed by, or subject to, the control of the court, and "requires the approval of the court before it can be treated "as final, then it is clearly a judicial sale. * * *

"Execution sales are not judicial. They must, it is true, "be supported by a judgment, decree or order. But the "judgment is not for the sale of any specific property. It is "only for the recovery of a designated sum of money. The "court gives no directions, and can give none concerning "what property shall be levied upon. It usually has no con"trol over the sale beyond setting it aside for non-compliance "with the directions of the statutes of the State. The chief "differences between execution and judicial sales are these: "the former are based on a general judgment for so much "money, the latter on an order to sell specific property; the "former are conducted by an officer of the law in pursuance "of the directions of a statute, the latter are made by the "agent of a court in pursuance of the directions of the court; "in the former the sale is usually complete when the prop"erty is struck off to the highest bidder, in the latter it must "be reported to and approved by the court."

See also—

Rorer, Judicial Sales, sections 1 to 30, inclusive, and particularly from section 5 onward.

17 *Am. & Eng. Ency. of Law* (2d ed.), pages 953 and 956.

On pages 989-990 of 17 Am. & Eng. Ency. of Law, under the title "Necessity for confirmation" and in the note found on page 956 of the same volume, entitled "Extent to which cases on execution and sheriffs' sales will be used in this article," will be found the true scope of the article on judicial sales in that work, notwithstanding the general expression of the rule found on page 1000.

Where by statute in some jurisdictions sheriffs' sales and execution sales have been placed on a par with all other sales, judicial and otherwise, we submit that this cannot prejudice the view that a "judicial sale" proper cannot thereby be reduced to the class of execution sales, at least in jurisdictions where no such statute exists.

It seems clear that in cases of sales at law the acceptance of the purchaser's bid operates at once to vest in him the ownership of the property and gives him an absolute right to have the sale completed. No confirmation is necessary, nor can the sale be subject thereto.

In the absence of any circumstances connected with such a sale and its conduct, such as fraud, mistake, surprise, etc., over which matters equity will take jurisdiction, no ground for equitable jurisdiction is afforded, and no relief can be obtained by a bill in equity to have the sale set aside. In such cases, where no ground for original equitable jurisdiction is presented and the only ground urged for affording the relief sought, upon an independent bill for such relief, is that of inadequacy of price, courts of equity, following the settled rule that in the absence of a ground for the exercise of equitable jurisdiction, as fraud, mistake, etc., occurring in a proceeding carried on under due form of law and in a law court, will not interfere. It has no jurisdiction to do so. Hence has arisen the rule now urged by the bidder in this case, which his counsel take to be the rule in all cases of all kinds of sales. The rule so established loses or fails of application to sales of an essentially different character and under an essentially different jurisdiction—under decrees in proceedings in equity. Cases cited which are prop-

erly assignable under this first division—law sales—and the rule which has grown out of them should not be taken as authority for application of the rule to sales strictly judicial. It cannot be said that because such decisions emanate from courts of equity they must apply to sales made under equitable jurisdiction. They constitute no more than a line of cases where equity declines to take jurisdiction or declines to interfere, where no grounds for equitable relief from otherwise regular and valid proceedings at law are set up.

Freeman on Executions, section 304*i*, heretofore cited by the appellants, does not contemplate cases originally brought in equity, but only those where "resort is had to an independent suit for the purpose of setting aside a sale" where it has been held that mere inadequacy of price, however gross, is not of itself a sufficient ground for relief.

This case having been brought in a court of equity, there is no need for casting about for grounds upon which the court may exercise its equitable jurisdiction over this phase of the cause.

Our reasoning is made all the stronger by the exceptions, found in many cases, that where there is fraud, mistake, surprise, or where the inadequacy is so great that fraud is presumed, these all occurring in a proceeding at law and all laying a special foundation for equitable interference, there will equity, on a bill for specific relief to have a law sale set aside, grant it if the mistake or surprise be sufficiently shown or the fraud or the presumption of it be not removed.

Under this first class of cases should also be included sales under a power, as in mortgages, pledges, trust deeds, etc., these being sales "equivalent to a sale pursuant to a judgment in an action at law" (2 Jones on Mortgages, sec. 1751).

To illustrate the argument that the confusion of all sales as "judicial" has grown largely out of a loose use of the term "judicial sales" we refer to

Rorer, Judicial Sales (2d ed.),

where, in chapter XVII, entitled "Setting aside execution sales," in sections 1086 to 1098, is set down the whole résumé

of the law in that respect as to execution sales at law, which counsel here and the courts in some jurisdictions have, because of an inexact use of the term "judicial sales," taken as the whole law on "judicial sales." But in the same work, at the very outset, is the law as to judicial sales proper, from sections 1 to 30, in which the law, as we view it, is fully set out and distinguished. See also section 106 of this work.

Again, Freeman on Execution, section 304*i*, has been cited by appellants. It is again on execution sales. But turn to section 311, and again the distinction is drawn.

Also let us quote briefly from section 21 of *Rorer on Judicial Sales* as to confusion of execution and judicial sales:

"In Griffith *v.* Bogert (18 How., 158, 164) Justice Grier "speaks of an execution sale as a judicial sale. But by "reference to that case it will be seen that it emanated "from Missouri, where by the statute laws execution sales "at law are reportable to the Court for confirmation. "* * * Such, too, is the case in Pennsylvania and some "other States."

Class II—Sales of a mixed character:

This class is the apparent result of the statutory abolishment in some jurisdictions of the distinction between execution sales, sheriffs' sales, and judicial sales, and also where by statute all actions at law and in equity are reduced to a common form and where a special execution is authorized in some cases. Here we find cases applying the rule under discussion to all sales, all being covered by use of the term "judicial sales." The result is a line of cases "not purely judicial." (See 2 Jones on Mortgages, sec. 1639.) To illustrate, some of these are as follows:

In the State of Nebraska, after the enactment of a special statute, the nature of which appears in the following quotation, its effect was noted as follows:

"The statute requires all real-estate sales upon execution "or order of sale, to be appraised, and provides that it shall

"not be sold for less than two-thirds of its appraised value. "The distinction, therefore, between sales upon execution "and those denominated judicial sales, has to a great ex- "tent been abrogated. This distinction however still re- "mains, that the sheriff in making a sale under an exe- "cution acts as the ministerial officer of the law, and not "as the organ of the court, the court neither ordering out "the execution or directing a sale of the debtor's prop- "erty. But in sales made under the authority of a decree "the court is the vendor, the commissioner making the "sale being the mere agent of the court."

Parrat vs. Nelligh, 7 Neb., 456.

See also *Bachle vs. Webb,* 11 Neb., 423, which shows that the court of that State did not regard the distinction between execution and judicial sales as altogether destroyed by the statute.

In our briefs heretofore we have presented to the courts below an exhaustive examined list of all the cases bearing in any way upon the question here, but we now omit not only the mass of collation *not* cited by the appellants, but also all of appellants' citations of cases which we deem properly assignable to the class of "legal" or "non-judicial" sales, as we feel that any reference to them, if cited, will serve the same end. But we desire to mention here a few examples of appellants' citations which we place in the second class of cases, namely:

Wall vs. McGalliard, 67 Ill., 519:

The reasoning in this case aptly supports our point, hereinafter made, of the effect of the existence of a statutory right of redemption after sale, and we here quote from it as follows:

"At judicial sales, where there is a redemption, it is a "well-known fact that lands, unless where necessary to "secure the debt, are rarely sold at anything approximat- "ing their real value. Such purchases are not looked "upon as a desirable mode of investment. There is seldom

"competition. The creditor for the most part has to take "the land in satisfaction of his debt and wait for it to be "redeemed;"

stating, then, the "rule" that mere inadequacy of price is not a sufficient cause for setting aside a sale, and citing:

20 Ill., 266, a bill to set aside a law judgment.

44 Ill., 398, a bill to set aside a mechanic's lien sale.

15 Ill., 444, a guardian's sale, citing 11 Johns., 556, and 26 Wend., 143, law sales.

Sigerson vs. Sigerson, 32 N. W., 462:

Foreclosure and special execution thereon.

Fidelity, etc., Co. vs. Roanoke Iron Co., 84 Fed., 752:

Cites authorities on execution sales.

C. P. R. R. Co. vs. Creed, 70 Cal., 497;
Connick vs. Hill, 127 Cal., 162;
Summerville vs. Murch, 142 Cal., 554;
Anglo-Cal. Bank vs. Cerf, 142 Cal., 303:

All foreclosure sales with special execution issuing against the mortgaged property primarily. The statute is quoted below.

Benton vs. Shreeve, 4 Ind., 69, 70-71:

An execution on foreclosure. It cites:

Livingston *vs.* Byrne, 11 Johns., 525, an execution sale.

White *vs.* Damon, 7 Ves. Jr., 30-34, an auction sale voluntarily made by the owner.

Mercerau *vs.* Priest, 3 N. J. E., 460, an execution, judgment, and sale at law.

Sales in States where the codes prescribe one common form of action in law and equity practice, and under which,

to foreclose a mortgage, the plaintiff first obtains a *judgment* on the mortgage debt, whereupon *execution* is directed by the court to issue for satisfaction of such judgment specifically against the mortgaged property, there being also a right of redemption after sale, should have no application to cases in the first or third classes; nor should decisions under statutes providing special executions "to be enforced as at law" or under special forms of execution be material.

It is significant that in a majority of the cases where the rule advanced by the appellants is approved and applied to sales in equity reference for authority and practice is usually made to cases of sales where the rule was properly applied—to law sales. For example see:

Benton vs. Shreeve, 4 Ind., 70-71;
Morrissee vs. Inglis, 46 N. J. E., 308, and
Smith vs. S. S. Columbia, 11 Haw., 709.

We think that the application of the rule to cases in this second class is not the result of statutory direction in the main, but rather the growth of a judicial custom brought about by the statutory abolishment of the distinction between sales under execution and in equity, and also by the influence of an existing statutory right of redemption in the States so deciding these cases, both of these causes being often coupled with an inaccurate use of the term "judicial sale."

In the Territory of Hawaii proceedings at law are entirely distinct from proceedings in equity. The court has its two sides—law and equity. In the Territory of Hawaii there is no statutory right of redemption after a foreclosure sale. In this Territory a mortgagor or other person interested in the property sold may obtain full relief only if he bids in the property at the sale. If he cannot do this, his rights are gone. In a majority of the jurisdictions outside of this Territory a mortgagor may save himself at any

time after the sale merely by redeeming after the sale at any time within the statutory limit, usually a year, and may pay the price for which the property was sold, and the greater the inadequacy and the resulting need for relief the more easily is the relief obtainable. By right of redemption we do not mean equity of redemption; the distinction is clear (Brown *vs.* Bannister, 15 Haw., 271).

Where decisions in cases of judicial sales proper are found in other jurisdictions which seem to support the application of the law rule to judicial sales, we urge that it is fair to conclude that the existence of a right of redemption in those States should be taken as having borne its weight in the consideration of the cases. This is evident as well where the right of redemption is not referred as where it is. The following cases show such to have been a material factor prompting the court's refusal to set aside a sale for inadequacy of price:

"Inadequacy of price is stated as one of the reasons why "the sale should be set aside. This is not sufficient ground "upon which to annul a sale, particularly under our prac- "tice when a judgment debtor is allowed to redeem."
Connick vs. Hill, 127 Cal., 165.

Also—

Anglo-Cal. Bank vs. Cerf, 142 Cal., 307.
Schroeder vs. Young, 161 U. S., 334, 338.
Twining vs. Neil, 38 N. J. E., 470.

Also—

2 Jones on Mortgages, sec. 1915, as follows:

"When by statute a time is allowed for redemption under "a sale, mere inadequacy of price does not vitiate the sale, "because the owner of the equity of redemption cannot "be prejudiced," citing 31 Mich., 426, where the court adds the remark that "it is only his failure to do this (redeem) which has been the cause of his loss."

Counsel for appellants have heretofore specially cited cases from Kentucky, Illinois, California, and other States, claiming them to have been unaffected by any statutes. We do not agree. We cannot anticipate what citations will now be made, but we quote the statutes from a few of the jurisdictions named:

In Kentucky the following statute exists:

"Art. V, ch. XXXVI (p. 317). How decrees in chancery "may be enforced.

"SEC. 1. A final order or decree for money, lands, slaves, "or other specific things, may be enforced by any appro- "priate writ of execution, allowable on a judgment at law, "according to the nature of the case.

"1. Such writ shall issue and be returnable as other "writs of execution.

"2. Nothing in this section shall prevent any party from "proceeding to carry any order or decree of the court into "execution, according to the ancient practice of courts of "chancery."

Illinois has a special statute, as follows:

(In foreclosure in equity:)

"The mortgaged premises may be sold to satisfy any "judgment the plaintiff in such action may recover, and "the court may award a special writ of *fieri facias* for "that purpose, to the county or counties in which said "mortgaged premises may be situated, and on which the "like proceedings may be had, as in other cases of exe- "cution levied on real estate" (Rev. Stat. 1897, chap. 95, sec. 21, p. 1104).

In California foreclosure is regulated by code provisions, all forms of actions being common, and special execution is issued against the mortgaged property, upon a judgment recovered, under the following statute:

"There can be but one action for the recovery of any "debt, or the enforcement of any right secured by mort- "gage upon real estate or personal property, which action "must be in accordance with the provisions of this chapter.

"In such action the court may, by its judgment, direct a "sale of the encumbered property (or so much thereof "as may be necessary), and the application of the pro- "ceeds of the sale to the payment of the costs of court, "and the expenses of the sale, and the amount due plain- "tiff. The court may, by its judgment, appoint a com- "missioner to sell the encumbered property. * * * If "the court appoint a commissioner for the sale of the prop- "erty, he shall sell it in the manner provided by law for "the sale of like property by the sheriff upon execution; "and the provisions of chapter one, title nine, part two, "of the Code of Civil Procedure, are hereby made appli- "cable to sales made by such commissioners. In the event "of the death, or absence from the States, or other dis- "ability or disqualification of the commissioner so appointed "to sell encumbered property, the court may, after the time "for redemption has expired, appoint an elisor to make the "deed or deeds due to the purchaser or purchasers or his "or their assigns, of the property so sold by said commis- "sioner" (§ 726, chap. 1, title X, part II, Code of Civil Procedure).

Much reliance has heretofore been placed by the appellants on the case of *Files vs. Brown,* 124 Fed., 133, and particularly upon the quotation therefrom that—

"In the absence of fiduciary relations or extraordinary "circumstances, courts and their officers are as firmly bound "by their actual sales both in morals and in law as private "citizens, and they ordinarily have no right or privilege to "rescind them upon any ground which is not equally "available to a private party."

Yet we submit that this case shows that it applies only to cases where there has been a *contract*—both an offer of a bid and an acceptance thereof by the court—and, moreover, only to cases where there has been a confirmation, and therefore a closing of the bargain, on the side of the court. In this case there was an order made by the court to the receiver *to sell and convey* the property to a *purchaser named* for a *price fixed in the order.* The court held only

that "when the order *has been executed* the court is as firmly "bound in law and in morals as any private citizen by "his *executed sale.*" (Italics ours.)

A marked distinction should be preserved between cases where the application for a resale is made before and where after confirmation by the court. In the one case the sale is incomplete; in the other the act of confirmation has made it complete and given the purchaser a vested right which he had not before held. This has been illustrated by some of the cases heretofore cited in this brief. Cases where the application for resale is made after there has been an acceptance of the bid by the court and a confirmation of the sale are not, then, we submit, fair precedents for cases like that at bar, where there has been a rejection of the bid and no confirmation and the application is promptly made. The record in the present case shows that the sale was held on February 4, 1905 (Transcript of Record, page 36); that the commissioner made his return of sale on February 8, 1905 (Transcript of Record, page 38); that William O. Smith, trustee, filed his motion for resale on February 13, 1905 (Transcript of Record, page 45); that the respondents, The Pacific Heights Electric Railway Company, Limited, and C. S. Desky, filed their protest against confirmation on the same day (Transcript of Record, page 47).

For other cases as to the rights of a bidder before and after confirmation see:

Rorer, Judicial Sales, sec. 545.
Wiltsie, Mortgage Foreclosure, sec. 469.
2 Jones on Mortgages, secs. 1637, 1641.
State vs. Campbell, 5 South Dakota, 636.
10 Wisconsin, 123; 63 North Car., 379.

The cases decided in

161 U. S., 334; 145 U. S., 367; 124 Fed., 137-138, and 92 Fed., 255,

were where the application for relief was made *after* confirmation.

Class III—Judicial sales:

In these the courts have not recognized the application of the rule here under discussion, and make the distinction for which we contend. It is here that the cases relied upon by appellants as authority touching the case at bar are referred to and distinguished. It is only to be remarked that sales of this class are not necessarily all those of foreclosure; other strictly judicial sales are included, as in partition, executors', administrators', and guardians' sales, etc., and also it is important to add that these may be less in number than those of cases of the first and second classes, the prime reasons being the almost universal existence of statutory provisions in the States regulating the method of sales, or combining actions in a common form, or where statutory rights of redemption are given. None of these conditions exist in the Territory of Hawaii.

Of these cases we quote from several as embodying practically the whole of our argument.

Johnson vs. Avery, 60 Minn., 265:

"We have examined all cases cited upon the question of "inadequacy of price, but most of them, excepting Illi- "nois, relate to execution sales. The purchaser's rights "in such sales are absolute, subject however to a right of "redemption. There is a vast difference between such cases "and those in partition, because in partition there is no "right of redemption" (citing Loyd *vs.* Loyd, 61 Iowa, 243).

Loyd vs. Loyd, 61 Iowa, 243 (S. C., 16 N. W., 117):

"Counsel for appellant insist that inadequacy of price "is insufficient to justify the court in setting aside a sale of "this character (partition). They have cited a large num- "ber of cases in which, it is said, this has been determined "by this court. But in the cases cited the sales were all "made by a sheriff under execution, or by a power expressly "conferred upon a trustee, or the like. In such cases no

"approval of the sale by the court is required, nor is any "discretion reposed in it, as in the case at bar. In sales "under execution, the right to redeem ordinarily exists. "Not so in the case at bar, and a different rule exists in "such cases. We believe it can safely be asserted that "counsel have not cited any case in which it has been "held that inadequacy of price is not sufficient to warrant "setting aside a sale of this character. In England an "increase of ten per cent. is regarded as sufficient. Here "the increase is nearly fifty per cent. The ruling of the "court is right and must be affirmed."

The case of *Trust Co. vs. Street Railway Co.*, 96 Iowa, 646-651 (S. C., 65 N. W. Rep., 982), is so manifestly parallel to the case at bar, in the respect that all the parties interested in the suit—the petitioner and the respondents vitally interested—are unanimous in seeking a resale, the only objector being the bidder, with no interest except such as arises from his bid, that we quote from it freely:

"No one contests the application for a resale except Hubin- "ger. In this respect the case is somewhat peculiar. He is "not a creditor nor has he any interest except such as "arises from his bid. It should be borne in mind that "the only authority possessed by the commissioner was to "receive and report the highest bid for the consideration and "action of the court. Hubinger's situation is such that "his right to resist, or even question, the application for "a resale, is questionable. He stands as one who has made "an offer and is awaiting an acceptance. It is not as in "case of the sale of property on execution. Mr. Freeman, "in his work on Executions, says (section 311): 'It must "'be remembered that there is a vast difference between "'execution sales and those made under decrees of chan- "'cery or probate courts, in respect to the rights of the "'purchaser and the power of the courts. In cases of sales "'made under decrees, and which may, therefore, be called "' "judicial sales," when the proceedings are reported to the "'court, the purchaser is simply a preferred bidder. The "'court is not bound to accept the bid, and may, in its "'discretion, refuse to confirm the sale for many reasons "'which would have no application where the purchase was

" 'made under execution.' In Rorer on Judicial Sales (sec.
" 106), treating of the confirmation of sales, it is said:
" 'Until confirmation by the court the sale confers no rights.
" 'Until then it is only a sale in a popular, and not in a
" 'judicial or legal sense. The chancellor has a broad dis-
" 'cretion in the approval or disapproval of such sales. "The
" 'accepted bidder," says the Supreme Court of Kansas, "ac-
" 'quires no rights, as in case of a purchaser under execu-
" 'tion," to have his purchase completed, but is merely a
" 'preferred purchaser until confirmation by the court as
" 'agreed to by its ministerial agent. In the exercise of
" 'this discretion a proper regard is had to the interest of
" 'the parties and the stability of judicial sales.' In Hay's
" appeal, 51 Pa. St., 58, which was a sale of land in a pro-
" ceeding for partition, it was said: 'Heirs to a decedent,
" 'when parties to a proceeding for partition in the orphans'
" 'court, stand in no relation of trust or confidence to the
" 'bidders at the orphans' court sale; and even the highest
" 'bidder, whose bid has been returned to the court as the
" 'best offered, has acquired no right which debars the
" 'heirs or their counsel from endeavoring to have his bid
" 'rejected and a resale ordered. It is their right to have as
" 'much obtained for the property as can be, and until such
" 'a sale has been made and confirmed they may seek for
" 'purchasers who are willing to give more than was offered
" 'at the public auction. His bid, though the highest,
" 'was but an offer to purchase, subject to the approval or
" 'disapproval of the court; and in approving sales made in
" 'partition it is the duty of the court to regard primarily
" 'the interest of the heirs.' "

"This language is significantly applicable to this case.
" Nearly all the parties affected by the decree and order of
" sale ask a resale, and none object to it. The case is made
" to turn squarely on the rights of the bidder, and we find
" nowhere an authority that gives him a favorable, if even
" any, standing in court for that purpose. His reliance,
" by way of authority, is largely on cases of sales on exe-
" cution, where a different rule prevails under universal
" authority. He also cites such cases as *White v. Wilson,*
" 14 Ves., 151, and *Mining Co. v. Mason,* 145 U. S., 349
" (12 Sup. Ct. Rep., 887), where the proceedings were to
" open sales after confirmation. It needs no argument to
" show that a different case is then presented, for, by the
" confirmation, legal rights are obtained. It is the accept-

"ance that completes the sale. Considerable space is devoted "in argument to the rule that sales will not be set aside "for inadequacy of price unless the inadequacy is so great "as to shock the conscience. That rule does not obtain in "this cla-s of cases. Appellee, in support of the rule, refers "us to *Graffam v. Burgess,* 117 U. S., 180 (6 Sup. Ct. "Rep., 686), where the rule is stated approvingly. We "have examined the case and find that it is one to redeem "from a sale of real estate on execution.

"The conclusion that a resale should be ordered is sup- "ported by the fact that there is neither appraisement nor "redemption in this case. This property cost some sixty "thousand dollars or upwards, and the showing prepon- "derates that it is now of three times the value of the present "bid, or more. If the parties could redeem, there would be "an opportunity to protect their interests, to some extent, "at least; but as the order now stands, the sale is final, and "for, confessedly, too small a sum."

In the case just cited the property was of only *three* times the value of the rejected bid; in the case at bar it was found to be *at least seven times* in excess of the bid. In the case now cited the property cost some sixty thousand dollars; in the case at bar the transcript of evidence on the hearing is not now before the court, but in the opinion of the Supreme Court (Transcript of Record, page 52) it is said:

"It is claimed that the property cost $78,000 exclusive "of the right of way only four years before. It was bonded "for $50,000."

See also—

Wood vs. Parker, 63 N. C., 379.
Phillips vs. Benson, 82 Ala., 500 (2 So., 93).
Tice vs. Zuisser, 76 N. Y., 548.
Hale vs. Clauson, 60 N. Y., 339, 341.
Jones on Mortgages, §§ 1637, 1638.
Rorer on Judicial Sales, §§ 8, 16, 17, 545, 529.
Wiltsie, Mortgage Foreclosures, §§ 469, 529.
State vs. Campbell, 5 So. Dak., 636, 640, 641-645.

In this last case the court reviewed the question of the discretion of the court to confirm or set aside sales for inadequacy of price alone, and upheld the exercise of that discretion of the court below in setting aside a sale for inadequacy of price even "when there is nothing in the case tending to show that the sale was not fairly and legally made, or which created a suspicion that the purchaser, and every person connected with the sale, did not proceed in a fair, upright manner in making it."

As to the points heretofore urged by the appellants that there should have been offered some kind of indemnity to the bidder and a guaranty to the court of an advance bid as conditions precedent to the ordering of a resale, it is submitted that these matters are not grounds for or against granting relief by a resale, but are terms which are addressed to the discretion of the court ordering the sale, and which the court might impose or not impose, as conditions might require. It might be done either by directing a resale to be made on the condition that within a stated time after the order certain terms in those respects should be complied with, on failure whereof the bid made should stand and be accepted, or by requiring that such conditions be met before resale ordered at all.

In the case at bar there can be no call for indemnity to the bidder, for he has expended nothing on the faith of his purchase, at least nothing beyond what he pays on an appeal in which, we submit, he has no right to prevail. His offer to turn the property over to the transit company, of which company he is general manager (see signature of that company to its answer appearing on page 27, Transcript of Record), was an offer made to a party to the suit with full knowledge of the whole circumstances of the decree and sale and the character and status of the bid. Moreover, the bidder has acquired no right, value, or interest

in the property, nor has he become liable for any costs, should the resale be confirmed, save those he has incurred on this appeal.

The court might, it is true, have required a guaranty for costs to accrue on a resale if it should fail to bring a sufficiently larger sum, or might have insisted upon an actual offer of an advanced bid in a sufficient amount before ordering a resale. It does not appear that these were deemed necessary, the court rather declaring in the order for resale:

"*I am satisfied*, in the case at bar that the price or sum "bid at the commissioner's sale for the property first de- "scribed in the decree, is grossly inadequate and dispro- "portionate to the value of the property offered for sale, "and *that an amount vastly in excess of the price or sum "bid, exclusive of the expense of a new sale, can be obtained* "on a resale thereof" (Transcript of Record, page 50. Italics ours).

But at the hearing there was no suggestion of objection by the appellants in this regard. It was only when their briefs were filed that the point was made. It was then that appellees, likewise in their briefs, offered to submit to any such terms as the court might deem proper. But the court made the order for resale without such conditions. Moreover, the Supreme Court did not regard them as essential under the circumstances. And it may well be held that such matters are such as may be waived as well by the parties as by the court. (See 2 Paige (N. Y.), 102, and 10 Wis., *124.)

We hesitate, in view of the record, to mention another point, but if it be claimed that inadequacy of price was the sole ground on which appellees relied on the hearing in opposition to confirmation before the circuit court, and to sustain this there be designated the protests of the appellees (appearing on pages 44 and 46 of the Transcript of Record) as showing only that ground, we must respond that the other circumstance, the mistake of Desky as to place

of sale, was not presented to the court until after the hearing on the return of sale and on the protests had been under way several days, when Desky took the stand as a witness. It was relied upon and fully presented to both courts below, but its consideration was regarded as unnecessary by them.

Lastly, it is submitted that whether or not a judicial sale should be confirmed rests in the sound judicial discretion of the court, and its ruling should not be disturbed unless it clearly appears that such discretion has been plainly abused. And although a sale may have been regularly and fairly made, yet if in the belief of the court the price offered is clearly and grossly inadequate, and that a confirmation would be opposed to the best interests of all the parties before it and under its care for whose benefit the sale is to be made, it is not only in the discretion of the court to refuse confirmation and order a resale, but it is its duty to do so. It is not necessary that the inadequacy be traced to its cause; it is sufficient only that its result is unfair and against the interests of those in whose interest it is made.

Nugent vs. Nugent, 54 Mich., 557;
State vs. Campbell, 5 So. Dak., 636;
Phillips vs. Benson, 82 Ala., 500 (2 So., 93);
Wood vs. Parker, 63 N. C., 379;
Jennings vs. Dunphy, 174 Ill., 86;

to which cases we add the decision of our own Supreme Court in this case.

We have endeavored to show the origin, growth, and tendency of application of the rule as to inadequacy of price. It had its foundation in the settled rule of the law that a sale was a sale, and the corresponding rule of equity that in such cases sales could not be set aside by resort to equity unless some special ground for equitable interference existed. It was then never administered with respect to sales purely judicial. Then followed the blending in many jurisdictions of forms of actions, the enactment of laws for special forms

of execution and sales thereunder, the creation of statutory rights of redemption, all of which tended to mold the application of the law rule to the new forms and conditions.

It is not to be denied that there is much soundness in the view that even in purely judicial sales the inadequacy should be very gross, or that some special circumstance calling for relief should be shown before a bid, fairly made, should be rejected. There must be regarded the necessity of giving judicial sales a reasonable degree of certainty and stability to render them a fairly desirable kind of investment, and so maintain the protection and opportunity for relief that judicial sales are intended to afford to litigants who invoke them.

But, where the application of the rule would work hardship and more severely prejudice the parties for whose very interest the sale is made than would the conditions of law which gave rise to the rule itself, and where the parties cannot by some means, such as redemption after sale, save themselves, and where there exists only the very plane whence the rule had its origin, here, we submit, the issue should be tried, and the principles applied, as initially.

If the court deems it unnecessary to go further than to find that the case at bar comes within the rule approved by our Supreme Court in this case and confirms the decision now under review, the appellees urge nothing more.

It may not be necessary, in this case, to decide whether such is the limit to which the court would go in cases of this kind. If otherwise, we respectfully submit that the Federal decisions to this time seem to be cases which originated in States having statutes constituting rules of property—affecting title to real estate—which are never disregarded by the Federal courts. It is urged that while the Federal courts will exercise their equitable jurisdiction without being affected by the statutes of any State and are not bound to follow the decisions of the State courts, still they have ever regarded and molded their decisions in harmony

with such State rules of property. And where they have decided a case in the light of a statute giving a right of redemption after sale, the effect of which they necessarily take cognizance in considering the necessity for relief under equitable principles, there is a different case from that here presented. Such cases should not, we think, be regarded as establishing a set rule for application to all judicial sales. Equity has no such fixed rule that its application will be made to a certain class of cases whether or not the result will be equitable. In the words of the circuit judge in this case, after his review of the law on the subject, "it "would be unconscionable to adopt an arbitrary rule for "guidance of a court of good conscience and of equal, exact "and substantial justice, which would tie its hands and "defeat the chief purpose of its creation and existence" (Transcript of Record, page 50).

It is respectfully submitted that the decision appealed from should be affirmed.

DATED HONOLULU, TERRITORY OF HAWAII, *October* 6, 1906.

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